BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: DAVIS BROTHERS FRAMING 8780 Prestige Court Rancho Cucamonga, CA 91730 Employer	Docket No. 03-R3D1-0114 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed by Davis Brothers Framing (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

On August 20, 2002, a representative of the Division of Occupational Safety and Health (the Division) conducted an investigation at a place of employment maintained by Davis Brothers Framing (Employer) at Alder Creek BelAir Homes, Irvine, California.

On December 27, 2002, the Division issued one citation to Employer alleging a serious violation of Title 8, California Code of Regulations[1] 1670(a) [fall protection required for employees exposed to falls in excess of 7 ½ feet]. Employer filed a timely appeal contesting the citation.

This matter came on regularly for hearing on October 21, 2004, before an Administrative Law Judge (ALJ) for the Board and the matter was submitted that day.

The ALJ rendered a decision on June 16, 2005, denying Employer's appeal, and imposing the proposed penalty offered by the Division, in the amount of $3,375.00. The ALJ so ruled because she concluded that the Division established that Employer was the only framing contractor on the site that day, that the photographs depicted three framers installing facia board,

[1] Unless otherwise noted, all sections references are to Title 8, California Code of Regulations.

which was the work performed by Employer that day, and that they were exposed to falls of 18 feet. On this evidence, she concluded a violation of section 1670(a) was established.

Employer filed a petition for reconsideration on July 21, 2005, asserting that the Safety Order cited in the Decision, section 1670(a) did not apply to it because, as a framing contractor performing framing work, the recently enacted Construction Industry Safety Order 1716.2(g) was the applicable safety order. Employer also asserted the evidence was insufficient to uphold the serious classification. The Division filed an answer with the Board on August 19, 2005.

EVIDENCE

The evidence consisted of the testimony of the Division inspector, Associate Safety Engineer Leonard Thomas, photographs Thomas took on August 20, 2002, and the testimony of Employer witness Bruce MacDougual, foreman for Employer. Also submitted in to evidence was Employer's equipment log sheet for August 20, 2002.

The photographs corroborate Thomas's observations of framing contractor employees installing facia board to the exterior of the second story of two residential homes being constructed at the site. In total, three employees either were not wearing a safety harness, or, if they were wearing a harness, the lanyard was not attached so as to prevent falls. The observations were made by Thomas in the initial 3-4 minutes he was on the public street adjacent to the buildings' construction. He took contemporaneous photographs.

After entering the construction site and locating the superintendent of the general contractor, Thomas and other Division and DLSE employees undertook an inspection under the Construction Safety and Health Inspection Program (CSHIP). Several hours passed before Thomas could locate and interview the framing contractor superintendent (MacDougual) regarding the identity of the workers installing facia board. By the time he did, all construction activity had ceased at the location.

During this conversation with MacDougual, and later on request, MacDougual produced the equipment log sheet for August 20, 2002. That log identified three employees given fall protection equipment who were assigned to install facia board. Two employees were referred to on the equipment log as "bro 1" and "bro 2." MacDougual identified a third one by name during the inspection, but the name was never disclosed at the hearing.

Further, Thomas testified that he measured the height of the building where the employees were observed installing facia board. The height of the work level from the ground below was 18 feet. This measurement was

consistent with his knowledge that the roof of two story residential building is typically 17-18 feet (8 foot ceilings (2 stories) plus one foot for floor/ceiling joists between floors).

Regarding the potential for serious injury resulting from falls of 18 feet, Thomas testified that he had over six years of experience as a Cal/OSHA inspector, and 20 years of experience as a construction training manager and in other management roles in building construction where safety was part of his responsibility. And, based on that experience, and on four recently investigated falls of even shorter distances, injuries like fatalities, fractures to hips and wrists, and blindness, are the types of injuries that result from falls of the distance he observed in this case. He further stated that statistical evidence supports his conclusion that falls of 18 feet cause serious physical harm and/or death.

MacDougal testified regarding his memory of the construction procedures used in his years working for Davis Brothers Framing. He testified that he issued fall protection to three workers that day, and required his employees to wear fall protection. He did not recall checking these individuals on this day for compliance with that requirement. He does not recall who was working for him that day, or the buildings that were being worked on, or the exact framing activity assigned to the employees given fall protection that day.

He did not testify regarding the height of the second story roof location where the workers were depicted in the photographs. He admitted Davis Brothers Framing was the only framing contractor at that site that day. In reviewing photograph 2D, he conjectured that perhaps the disconnected lanyard in that picture was the reason for the citation. He did not recall identifying any of Employer's employees at the time of the inspection.

ISSUES

1. Is the appeal properly dismissed when the safety order in the citation is amended between the time of issuance and the time of hearing, but the evidence establishes a violation of both the current and former safety orders?

2. Was there sufficient evidence to support the Serious classification?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

When a new safety order is enacted between the time of the citation and the time of the hearing, an appeal must be granted so long as either the proscription was removed or the employer is in compliance with the new,

changed order. (*Maecon, Inc.*, Cal/OSHA App. 78-049, Decision After Reconsideration (Dec. 28, 1983); *California State Department Of Transportation*, Cal/OSHA App. 84-1014, Decision After Reconsideration (Oct. 30, 1987).) That is, if the conduct which is the subject of the violation is later allowed, the employer cannot be found to be in violation of a safety order that does not exist. However, if the conduct that is the subject of the violation remains a violation of the new, changed safety order, the citation may be properly upheld. (*Sheedy Drayage*, Cal/OSHA App. 84-518, Decision After Reconsideration (Dec. 24, 1986).)

In *Maecon*, *supra*, the conduct which was the subject of the violation (ladders on the ends of scaffolds with rungs 24 inches on center) constituted a violation of a ladder safety order at the time of the citation. Shortly thereafter, a separate safety order was enacted that allowed the use of the specific scaffold-end ladders that were the subject of the violation. Since the employer was in compliance with the new safety order, the appeal was necessarily granted. "The Appeals Board has set aside citations if, by the time the case comes before the Board, the Standards Board has modified a safety order so that the cited conduct would no longer be violative." (*The Herrick Corporation*, Cal/OSHA App. 97-1373, Decision After Reconsideration (Feb. 7, 2001).) No case, however, allows an appeal to be granted when the employer remains in violation of both the old and the new Safety Order. "When an employer has failed to comply with the safety order it asserts is more particular or appropriate, it cannot argue the inappropriateness of the cited safety order as a defense." (*Sheedy Drayeage, supra,* citing *California Erectors, Bay Area, Inc*, Cal/OSHA App. 84-1254, Decision After Reconsideration (Sept. 30, 1986) and *Pacific Gas & Electric Co.*, Cal/OSHA App. 82-1102, Decision After Reconsideration (Dec. 24, 1986).)

Here, the conduct which was the subject of the violation was exposing framing employees to a fall of 18 feet. At the time the Citation was issued, this violated section 1670(a) which prohibited exposure of all workers to falls in excess of 7.5 feet. In the interim, section 1716.2 was enacted proscribing exposure to falls in excess of 15 feet for framing contractor employees. Unlike the employer in *Meacon*, Employer herein was not in compliance with either the old or the new safety order. So, the granting of Employer's Appeal is not warranted on that ground.

The Division's witness credibly testified that he observed framing contractor employees exposed to 18 foot falls without any fall protection devices being used. He took photographs which corroborate his testimony recalling his personal observations. The undisputed testimony established that Employer's employees were the only framing contractor employees at that location on the day of the inspection. There was no testimony that any first-story roof structure effectively reduced the fall distance, nor do the

photographs support such an assertion. The reasonable inference we draw is that employees of Employer were exposed to 18 foot falls on August 20, 2002. Thus, the Division established a violation of section 1716.2.

Since Employer failed to show it complied with a more specific, or otherwise more suitable, safety order, it cannot complain of any defects in the citation. (*Sheedy Drayage, supra*; *California Erectors, Inc, supra*.)

2. The record contains substantial evidence that the Serious classification was appropriate.

A Serious classification is governed by Labor Code section 6432. That section requires proof that if an injury were to occur, it is substantially probable that such injury could result in serious physical harm or death, unless the cited employer proves that it did not know of the violation and could not have known of it by exercising reasonable diligence. (Labor Code § 6432.)

> To classify a violation as serious, the Division must show that there is a substantial probability that death or serious physical harm could result from the violation. Labor Code section 6432(a); *MV Transportation, Inc.*, Cal/OSHA App. 02-2930, Decision After Reconsideration (Dec. 10, 2004). The phrase "serious physical harm" is not defined in the regulations, but the Board has equated it with "serious injury or illness" as defined in Labor Code section 6302(h). *Abatti Farms/Produce*, Cal/OSHA App. 81-0256, Decision After Reconsideration (Oct. 4, 1985); see also, *Puritan Ice Company*, Cal/OSHA App. 01-3893, Decision After Reconsideration (Dec. 4, 2003). Labor Code section 6302(h) defines "serious injury or illness" to mean "... any injury ... which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement ..." Ja Con *Construction Systems, Inc. dba Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006).
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> The degree of evidentiary support needed to uphold a serious classification varies in Board precedent, because each case differs and presents different evidence, all of which must be evaluated on its own merits. Nonetheless, the Board has repeatedly held that opinions regarding the probability of serious injury must be supported by reasonably specific scientific or experienced based rationale, or generally accepted empirical evidence. E.g., *Brydenscot Metal Products*, Cal/OSHA App. 03-3554, Decision After Reconsideration (Nov. 02, 2007); MV Transportation, Inc.,

supra; *R. Wright & Associates, Inc. dba Wright Construction & Abatement*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999); see also, *Ja Con Construction Systems, Inc. dba Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006).

California Family Fitness, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20, 2009).

Here, the Division witness provided testimony of his experience investigating fall accidents, and his experience in construction projects that included responsibility for safety. This experience exceeded 20 years, including six years as a Division investigator. His rationale for testifying that falls at a height of 18 feet likely result in serious injury such as fractures, blindness, and death, was his experience investigating such accidents, as well as his knowledge of statistics that bear out his conclusions. (*Matarozzi-Pelsinger Builders, Inc.*, Cal/OSHA App. 01-1400, Decision After Reconsideration (Aug. 12, 2004).) The Division provided adequate evidentiary support to uphold the serious classification.

Employer bears the burden of showing reasonable lack of knowledge of the violation in defending against the Serious classification. (*Matarozzi-Pelsinger*, *supra*.) If Employer was actually unaware that its employees did not properly use the fall protection equipment purportedly issued to them, there is no evidence that this lack of knowledge was reasonable. Rather, it is reasonable to expect supervisors to notice that the fall protection equipment was not being used properly, and to investigate further upon so noticing. "Their failure to notice was therefore the result of a lack of due diligence." (*XL Construction*, Cal/OSHA App. 08-1191, Denial of Petition for Reconsideration (Aug. 11, 2009).) The violation was visible to inspector Thomas when he was standing on the street looking at the workers on the roof. Had the supervisor also observed his employees, the violation would have been discovered. There is no evidence justifying this failure to notice the violation. For these reasons, the record supports a finding of a serious classification of the violation.

DECISION AFTER RECONSIDERATION

The evidence establishes a violation of both the cited safety order, section 1670(a) [lack of fall protection at height of 7.5 feet] and the more specific and subsequently enacted safety order, section 1716.2 [framing contractor employees must be protected from exposure to falls in excess of 15 feet]. The citation alleged lack of fall protection exposing employees to an 18 foot fall distance, and the evidence supports the allegation. Also, the Division's witness provided expert testimony by way of his experience-based rationale supporting

the conclusion there was a substantial likelihood of serious injury or death should an injury occur as a result of this violation.

We have fully considered Employer's arguments that the incorrect safety order was cited, that the fall distance was something less than 18 feet due to alleged "lower level roof structures," and that the evidence supporting the serious classification was legally insufficient. For the foregoing reasons, and after review of the evidence in the record, we conclude these arguments are not supported by the record. We conclude that the denial of the appeal was the correct result and the serious classification is appropriate. We agree that the $3375.00 penalty is appropriate.

CANDICE A. TRAEGER, Chairwoman
ART R. CARTER, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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